No. 75-647

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOURTH APPELLATE DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 73-647

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

J. KENNETH JENSEN,
Petitioner,
vs.
HERMAN O. GANT,
Foreman of the Grand Jury,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

Petitioner seeks a Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, to review that court's opinion filed June 17, 1973 denying his Petition for Writ of Mandate to Herman O. Gant, Foreman of the Grand Jury of the County of San Diego. A Petition for Hearing in the Supreme Court of the State of California was denied on July 18, 1973. A copy of the order of the Supreme Court of California

and the opinion of the Court of Appeal are appended to the Petition for Writ of Certiorari docketed in this Court on October 12, 1973.

JURISDICTION

Jurisdiction in the Petition is invoked pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

The Petition raises the following question (as phrased by Petitioner): Where a citizen, represented by an attorney, has evidence of crimes committed by government officials, do procedural rules of a grand jury which withhold from him the free access to the grand jury enjoyed by the district attorney deny equal protection of the law?

CONSTITUTIONAL PROVISION INVOKED

Petitioner alleges denial of rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF FACTS

At or about 8:55 a.m. on or about May 17, 1973, the secretary to the Grand Jury of the County of San Diego advised Respondent Herman O. Gant that Petitioner was personally in the office of the Grand Jury and wished to talk to him. This request was made approximately five minutes before the Grand Jury was scheduled to convene for a regular session for the conduct of its business. Petitioner requested that he be allowed to personally present to the Grand Jury at that time evidence of alleged criminal activity. The facts or the nature of this alleged criminal activity were not

discussed with Respondent. Respondent Gant informed Petitioner that neither the statutes of the State of California nor the rules of procedure of the Grand Jury of the County of San Diego permitted such a practice. However, Respondent Gant advised Petitioner that he could submit his complaint in writing to the Grand Jury setting forth the alleged criminal activity and that such complaint would be referred to and investigated by an appropriate committee of the Grand Jury. No such complaint was received by the Grand Jury from Petitioner.

ARGUMENT

I

CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE SINCE NO SUBSTANTIAL FEDERAL QUESTION EXISTS SINCE THE EQUAL PROTECTION OF THE LAWS DOES NOT REQUIRE UNIFORMITY OF PROCEDURE AND THE DECISION OF COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, RESTS ON ADEQUATE INDEPENDENT STATE GROUNDS.

The Grand jury under California law is an arm of the judiciary and its purpose is as much to protect the citizen against unfounded charges as it is to make charges when there is sufficient evidence of guilt (*Matter of Tyler* [1884] 64 Cal. 434, 437; *United States* v. *Dionisio* [1973] 410 U.S. 1, 35 L.Ed.2d 67; 81 ft.nt.15: see also *Kennedy* and *Briggs, Historical and Legal Aspects of the California Grand Jury System,* 43 Calif.L.Rev. 251 [1955]). The provisions relating to the powers and duties of the grand jury are found in the California Penal Code (Pen. Code, § 888 et seq.). The grand jury "may inquire into all public offenses committed or triable within the county and present them to the court by

indictment" (Pen. Code, § 917). Investigation is made in the first instance upon complaint made either by the district attorney, by a grand juror or by a private citizen (*People* v. *Lawrence* [1863] 21 Cal. 368, 373). In the instant proceeding, Petitioner contends that he has a right to "present evidence" before the Grand Jury. Obviously, Petitioner has no such right nor does Respondent have any duty to allow him to personally appear and present such evidence.

The statutes of California are clear that except as expressly authorized the sessions of the grand jury are private and that no person is permitted to be present during the session of the grand jury except the members and witnesses actually under examination (Pen. Code, §§ 939 and 939.1; see also: *People* v. *Rojas* [1969] 2 Cal.App.3d 767, 769-770; see also Rule 6, F.R.Cr.P.). Petitioner, unlike the district attorney, has no right to appear before the grand jury to present a case (Pen. Code, § 935). The only way an unauthorized person may be called before or attend upon a grand jury session is that of witness during the actual taking of his own testimony (*People* v. *Brown* [1927] 81 Cal.App. 226, 248).

Petitioner's contention that he (or his client) has been denied equal protection of the laws since "the grand jury must afford citizens the same access enjoyed by the district attorney" overlooks the principle established by this court that the equal protection clause does not exact uniformity of procedure (*Dohany* v. *Rogers* [1929] 281 U.S. 362, 369, 74 L.Ed. 904, 912). The fact that the district attorney is charged with the detection of crime and prosecution of criminal cases supports a difference of procedure (Gov. Code, §§ 26500 and 26501). In any event, Petitioner has failed to allege that he complied with the procedures established by the Grand Jury of the County of San Diego for the bringing

of complaints before the Grand Jury. Petitioner was not refused access to the Grand Jury. Respondent Gant merely advised him that any complaint would have to be presented to the Grand Jury in accordance with the laws and procedures applicable to the Grand Jury.

II

CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE BECAUSE IT IS NOT CLEAR FROM THE RECORD THAT A FEDERAL QUESTION WAS RAISED BEFORE AND DECIDED BY THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, AND THEREFORE THERE IS INSUFFICIENT BASIS TO SUPPORT JURISDICTION IN THE UNITED STATES SUPREME COURT.

Based upon a review of the record before the United States Supreme Court it is not clear that a federal question was raised and decided by the Court of Appeal of California, Fourth Appellate District. Petitioner has failed to comply with the provisions of Rule 23(1)(f) of the Supreme Court Rules. The Petitioner requested the Court of Appeal to issue a Writ of Mandate to Respondent directing that Petitioner be permitted to present evidence of criminal activity to the Grand Jury for their consideration. Respondent answered such Petition. The Court of Appeal denied the Petition for Writ of Mandate "on the ground Jensen has failed to follow the procedure outlined in the answer for presenting complaints to the grand jury" (Pet. [App.]).

The Writ of Mandate is granted only under the provisions of sections 1085 and 1086 of the California Code of Civil Procedure. Under California law a person seeking a Writ of Mandate must

demonstrate that he is clearly entitled to the Writ before it will issue (*Parker* v. *Bowron* [1953] 40 Cal.2d 344, 351). Issuance of the Writ is discretionary (*Pettis* v. *Municipal Court* [1970] 12 Cal.App.3d 1029, 1031). Petitioner did not advance any federal constitutional question in either his Petition for Writ of Mandate filed in the Court of Appeal or in his Petition for Hearing in the California Supreme Court. Also it is clear that the opinion of the Court of Appeal rests on an adequate non-federal ground, i.e. Petitioner had not complied with the procedures of the Grand Jury applicable to the filing of complaints by private citizens.

CONCLUSION

It is the crucial test to the exercise of certiorari jurisdiction that the controlling issue in the state court must be a federal issue and that such issue must meet the substantial question test, that the federal question must have been properly raised in the state court and that the state court decision does not rest on an independent state ground. It is clear that the Petitioner herein does not present the requisites to warrant the exercise of certiorari jurisdiction by the United States Supreme Court.

Even if it be concluded that the constitutional issue was properly raised and was the basis for the decision of the California court, the question should not be considered as substantial to warrant the granting of certiorari.

Therefore, Respondent respectfully urges that this honorable Court deny the Petition sought herein.

Respectfully submitted,

ROBERT G. BERREY, *County Counsel*
County of San Diego

BY JOSEPH KASE, JR., *Assistant*
LLOYD M. HARMON, JR., *Deputy*
302 County Administration Center
1600 Pacific Highway
San Diego, California 92101
Attorneys for Respondent

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Respondent

Certificate of Service

I hereby certify that on this 26th day of November, 1973, three copies of the Brief for Respondent in Opposition were mailed, postage prepaid, to each of the following named persons:

J. Kenneth Jensen, Esq.
7917 Ivanhoe Avenue
La Jolla, California 92037

I further certify that all parties required to be served have been served.

ROBERT G. BEEREY, *County Counsel*
County of San Diego

BY JOSEPH KASE, JR., *Assistant*
LLOYD M. HARMON, JR., *Deputy*
302 County Administration Center
1600 Pacific Highway
San Diego, California 92101
Attorneys for Respondent